неотчуждаемости и неотъемлемости прав человека демократической Конституции РФ не оказались на втором плане при описании сложного процесса обсуждения и принятия Конституции РФ 1993 г. Ценность человеческих прав легко теряется, как подтверждает мировая история, когда начинается конфликт частных интересов конкурирующих лидеров политических партий, либо конфликт интересов государства и общества. В условиях повышенной конфликтности современного мира важно развивать альтернативные (внесудебные, невоенные, ненасильственные) процедуры разрешения конфликтов и споров, т. к. процедуры медиации в политике, образовании, социально-экономической и правовой сферах. Необходимо формировать в современном обществе и государстве не разрушительную культуру противостояния, а созидательную культуру уважения и защиты человеческих прав и свобод, сохраняя и развивая наследие российского конституционализма.

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## Central European constitutionalism — with special regard to the role of national sentiments and fear

This paper argues for a slightly unconventional thesis: public sentiments have been playing a formative role in Central-European constitutionalism during the last twenty years. Legal scholarship interested in Central-European issues [1] has not paid serious attention to this phenomenon so far, it solely reflected on it as it were of a secondary importance [2]. However, if one takes into account the impact of public sentiments, it can foster a better understanding of the last twenty years'

constitutional development. In addition, the assessment of the role of public sentiments may open new perspectives for discussion.

The recent trends of Central-European constitutionalism have already been discussed from many aspects in the relevant literature. Philosophical, ideological, historical and legal arguments came up in order to explain its features [3]. However, contrary to the earlier approaches this paper relies on the findings of the so-called «law and emotions scholarship» becoming more and more popular in the United States. In one word, «law and emotions» scholars try to overcome the conventional and widespread modern approach separating law and the emotions as two distinct subjects that may have some occasional contact. They argue that law and the emotions overlap on many points and they can properly be understood with regard to each other [4]. So, these two phenomena — even if they seem to be generally incompatible with each other in the eyes of modern jurisprudence — can and should be studied together. Of course, this is a real methodological challenge since neither law nor the emotions have a clear conceptual meaning, their interpretations change by varying the philosophical bases. Yet, this does not make the analysis of affective impact on legal phenomena impossible at all.

1. From emotions to constitutional sentiments

Firstly, to get an adequate conceptual basis for further discussion, some methodological points should be clarified. As a starting point, it must be stressed that this analysis is not about the emotions in general, but it relies on the concept of constitutional sentiments. As András Sajó elaborated it, constitutional sentiments are a part of general public sentiments and their distinctive feature is that they have a constitutional or public affairs relevance [5]. So, this paper does not intend to deal with the emotions in general, but it only formulates certain conclusions with a more moderate scope: the domain of public sentiments.

In general, public sentiments originate from socially interacting individual emotions that are able to offer stable, namely long-lasting and enduring, emotional patterns. It is argued by Sajó, if society reflects on these emotional patterns in public discussions for a longer while, a gradual homogenization and consolidation process starts and this may

lead to the formation of a new public sentiment. In this public sentiment creating process both culture and media have a prominent role. The earlier regulates how people can express emotions, while the latter provides various channels to do so. In sum, public sentiments are more than «simple aggregation of individual emotions»; they are structured common reflections on public concerns [6]. And, those public sentiments that are primarily focused on constitutional or political issues can become constitutional sentiments being able to influence both constitutionalism and the corpus of constitutions.

It is worthwhile showing an example in order to illustrate the earlier theory on the birth of public and constitutional sentiments. No one doubts that fear is a general human emotion and it can stem from many reasons. People may have fear of the uncertain future, unpredictable catastrophes, specific persons, illnesses and many other things. And, people may have fear of the uncontrolled, tyrannical power in a community, too. If people start to discuss their worries publicly and a longer debate emerges this fear begins to take shape as a structured and collective phenomenon acquiring a clear socio-political meaning: power must be limited, since the lack of control is dangerous to the society. Thereby a new constitutional sentiment emerges and it qualitatively differs from the individual worries since it is articulated within the conditions of the political sphere [7]. Moreover, if the constitution-maker is interested in taking into consideration these public concerns on the dangers of unlimited power there might be some chances that this public sentiment will be incorporated during on-going design of the constitutional architecture.

When and why can a constitutional sentiment be successful, meaning that it is able to influence certain constitutional provisions? Obviously, many constitutional sentiments compete in a given historical moment and some of them are unable to exert any influence on the development while others may be seemingly successful. Sajó argues that the constitutional incorporation of public sentiments is always a result of power choice but there are some factors increasing the chances. A major one amongst them is morality. If a constitutional sentiment has a strong moral support namely that the people believes that it is generally

good and things should be so, this might provide a good chance to be reflected in constitutionalism in the longer run. The main reason is that politicians generally strive to make decisions in conformity with either the majority's feelings or some widespread moral judgments. Just take the example of the abolitionist movement in North America or the formative years of human rights declarations at the end of the 18th century. But, it must be emphasized, the constitutional incorporation of public sentiments is always culture and age dependent, therefore there are no general laws in this sense [8].

Having clarified the most important conceptual points a last remark should also be made on the validity of this constitutional sentiment-oriented legal understanding. This paper does not claim at all that this «law and emotions» approach focused on constitutional sentiments entirely explains the unique, maybe divergent, features of Central-European constitutionalism. That would be an apparent exaggeration of its explanatory value since, obviously, there have been many other factors — ie. historical, political and cultural ones — shaping the picture of these constitutional cultures. What the paper claims is much more modest, simply, the role of public sentiments are also worthy of consideration since this way of thinking can make the picture more complete and detailed [9].

2. National sentiments as engines of constitutional development

It can hardly be denied that a so-called national renaissance has occurred in the region during the last twenty years. National sentiments broke out following the fall of iron curtain immediately [10]. Just think of the rebirth of Baltic States, the dissolution of Czechoslovakia and Yugoslavia in a relatively short period, and the birth of entirely «new» countries as for instance Moldavia or Slovenia. Seemingly, this process means that the people of Central-Europe reconstructed or reestablished both their national identity and the community framework of their existence. All in all, it has considerably changed the map of Central-Europe in ten years. Furthermore, this harsh rebirth of national sentiments may be regarded as a natural reaction to the internationalist and oppressive policies of the Cold-War period trying to neutralize the «national question» in Central Europe.

Besides historical, political and international effects, this regional national revival has also become an engine of constitutional development. Interestingly, it led to the formation of such legal institutions and solutions that were either entirely new or qualitatively different from the Western patterns on some points. That being said, the «westernization» of Central-European constitutionalism that followed the fall of Soviet influence has been merged with the strong influence of national sentiments. Thus, behind the clear reception of the Western constitutional patterns a not as obvious «nationalization» of these constitutional cultures happened, too.

The following examples may properly illustrate the earlier «nationalization» process.

I. At the beginning of 90s, the Baltic States all enacted such acts on citizenship that were openly discriminative against the Russian population living in these countries. These acts linked the citizenship of a given state to the fulfillment of cultural requirements, for example, a good command of the official language. With Western eyes, these acts contravened the generally accepted standards of non-discrimination based on nationality, therefore the Council of Europe, specially the Venice Commission, was heavily engaged in the dispute over them [11]. However, if one applies the constitutional sentiments approach it is not too difficult to identify some national sentiments, namely the frustration stemming from the decades-long oppressive Soviet policies trying to undermine the Baltic nations' national identity and existence, as a main impetus to that kind of regulation.

II. From the 2000's some of the Central-European countries — ie. Hungary, Romania and Slovakia — enacted special acts providing preferential treatment for those who belong to the same nation in the neighboring countries. Clearly, the concept of nation as a cultural community that may transcend official state boundaries backed these acts. These were the so-called «status acts» that provided support on the level of both: the individual and the minority community [12]. Again, from many aspects, as for instance the aspect of regional politics, these acts seemed to be quite irrational since they apparently disturbed relationship among these countries. Furthermore, there was also an intensive

internal political discussion since the privileges provided by these acts were partially questioned by public opinion. However, the primary importance of national sentiments as one of the decisive constitutional sentiments properly explains why these countries chose that kind of unusual extraterritorial legislation to support some minority groups having the same national identity in the neighboring countries. It was not solely a question of legal and political rationality but also had an obvious emotional aspect. This emotional dimension took shape as an influential constitutional sentiment and it considerably contributed to the birth of these acts.

III. Lastly, national sentiments even manifested in special constitutional provisions declaring the responsibility of these countries for the minority groups living outside of the borders. These «national responsibility clauses» are within the first and general articles of the constitutions thereby stressing their constitutional importance. These provisions may be centered around the cultural identity of a given nation as a belated sign of cultural nationalism [13], they may form legal basis for acts providing special status for those members of the national community who live in the neighboring countries [14], or may prescribe comprehensive obligations for the given country to support the communities situated outside the official state borders [15]. Contrary to all these divergences, however, these constitutional provisions share a common point, they point out to what a high extent the thinking of Central-European constitution-makers have been seduced by national sentiments stressing the imagined national unity.

In conclusion, national sentiments have gradually been converted into a constitutional sentiment considerably affecting the constitutional cultures of Central-European countries in the last twenty years. The strong and wide-ranging moral support — only a minority, mostly intellectuals, has contested the relevance of national sentiments in these countries — was a decisive point in their success. Moreover, the *Zeitgeist* — so to speak the spirit of the age — also helped them to exert influence over public and constitutional affairs as the regional political sphere was also opened and sensitive to nationalist policies as compared to the Socialist era.

3. Fear of losing independence

The second sentimental impetus in present-day Central-European constitutionalism is undoubtedly fear. It can hardly be debated that fear is one of the most influential sources of constitution-making [16], yet, the Central-European situation was somewhat different from the general, Western pattern. Since the era of Enlightenment the main task of many constitutional provisions has been to manage the community's fear of exclusive and tyrannical power [17]. However, this motive behind the post-Socialist constitutional development has had a slightly different character. Here, fear is coupled with the national existence, with special regard to political independence.

One of the main historical experiences of nations in Central-Europe is, indeed, their continuous struggle for independence. Peoples of this region have had to fight for their independence in the last two centuries many times. Just think of modern Polish history. Poland lost its real national independence four times after 1795 (1795, 1815, 1939, 1945), although some forms «puppet statehood» have definitely existed in these two centuries. Still, political and constitutional autonomy only remained a claim of non-realistic nature. Thus, the loss of independence and the forthcoming external oppression — that could come from both directions, from the West and the East — is a chief existential experience. As István Bibó, an eminent Hungarian scholar of Central-European history argues, it even distorted these peoples' mentality by establishing a special inclination to political hysteria, that is, to pure emotional reactions in political questions having an existential nature [18].

Therefore, it is not too surprising that this kind of collective fear of losing political and national independence have also been transformed into a constitutional sentiment in the post-1989 era. Central-European constitutions embody it in different ways.

I. The preambles of the region's constitutions are rich in references to various independence fights [19]. These parts of preambles stress either the importance of these fights in national remembrance or the tragic nature of defeats. As a result, they convert them into the constitutional sphere. This phenomenon cannot be overlooked since

the preambles — although their normative value is debated — always inspire the legislator and they also create a central narrative for public life. So, the struggle for independence got a symbolic place in Central-European constitutionalism, and, therefore, it could contribute to the collective management of these frustrations. The phrasing of these preambles is always passionate, emotional and solemn. Some parts of them are definitely much closer to poetry than to strict legal style and vocabulary [20]. If one regards these elements of Central-European constitutions as a reflection of a fear for independence as a constitutional sentiment, their real meaning and value become easily identifiable. Basically, their task is to manage the frustration stemming from lost independence fights on a constitutional level by acknowledging their historical role and significance. Thus, public sentiments related to tragic national defeats have been transformed into constitutional values from historical memory having a rather subjective, relativistic and fluid nature.

II. Secondly, this collective fear of losing independence also influenced a very peculiar segment of constitutional provisions. It can be argued that those constitutional articles which make the EU accession constitutionally possible by creating a clause for the transfer of some sovereign competences to the Union level are quite restrictively worded in Central-European constitutions [21]. The nature of these «Europe-clauses» becomes even more apparent if one compares them to Western provisions. For instance, the relevant provision of the Hungarian constitution relies on the term of «joint exercise of competences» when regulating the transfer of competences to the EU level. Moreover, it stresses that this can only be done to the necessary extent thereby raising another substantive limit [22]. And, besides practical concerns, this unique feature can also be explained by those constitutional sentiments that are focused on the preservation of national independence and are propelled by the fear for independence [23].

That said, the constitutional-sentiments oriented-approach can explain what ordinary constitutional law scholarship cannot do properly: why these clauses are so different in Central-Europe from the Western solutions. They are tailored in a different, perhaps extravagant

way, since they reflect the sovereignty concerns of Central-European nations and try to defend them as much as it is possible under the conditions of European Union law.

4. Conclusion

Legal scholarship devoted to the study of constitutional sentiments will not solve all the scholarly problems for sure. And, it need not do it at all. The integration of emotional components into legal discussion can raise further questions expecting novel answers. Nevertheless, the above may illustrate how sentiment related studies can help us get a more nuanced and refined picture on unconventional problems of constitutional law. The acts and constitutional provisions mentioned above seem to be troublesome factors deviating from the Western model as long as only strict constitutional law doctrines are applied. However, if one regards them as manifestations of specific constitutional sentiments having various historical and socio-cultural roots, they immediately gain a proper meaning and lose their obscurity. Thus, constitutional sentiments are worthy of studying since it may provide us a better and clearer view.

## Примечания

1. For a general discussion on Central-Europe see: *Szűcs J.* The Three Historical Regions of Europe. In: V. Gessner–A. Hoeland–Cs. Varga (eds.). European Legal Cultures. Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1996. P. 14–48 ; *Schöpflin G.* The Political Traditions of Eastern Europe. 119 // Daedalus 1990/Winter. 55–90 ; *Péter L.* Central-Europe and its Reading into the Past. 6 European Review of History. 1999/1. P. 101–111.

2. For example: *Roth S. J.* The Effect of Ethno-Nationalism on Citizens' Rights in the Former Communist Countries. In: A. Sajó (ed.) // Western Rights? Post-Communist Application. Kluwer Law International, The Hague–London–Boston, 1996. 273–290.

3. See for example: *Priban–J. Young J.* (eds.). The Rule of Law in Central Europe. Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1999.

4. For more see: *Abrams–H. Keren K.* Who's Afraid of Law and the Emotions? // Minnesota Law Review. 2010/2011. № 94. P. 1997–2074. Or *Maroney T. A.* Law and Emotions: A Proposed Taxonomy of an Emerging Field. 30 Law and Human Behavior. 2006. P. 119–140.

5. *Sajó A.* Constitutional Sentiments // Yale University Press, New Haven and London, 2011. 12.

6. *Id.* P. 20.

7. *Sajó A.* Limiting Government. An Introduction to Constitutionalism. Central European University Press, Budapest-New York, 1999. P. 1–47.

8. *Sajó A.* Op. cit. 2011. 25.

9. And, this picture really needs additions as the conventional understanding simply regards Central-European legal systems as a part of Western Law because they almost completely incorporated Western legal solutions. This comprehensive import of Western laws and institutions was mainly due to the broad legal assistance activities of the 90s and the harmonization requirements of the EU accession. Cf.: *Giaro T.* Legal Tradition of Eastern Europe. Its Rise and Demise // Comparative Law Review, 2011. № 2. P. 1–23.

10. For more: *Wandycz P. S.* The Price of Freedom. A History of East Central Europe from the Middle Ages to the Present. Routledge, London — New York, 1992. P. 244–265. From a political science perspective see: *Filip Černoch-Jan Husák-Michal Vit.* Political Parties and Nationalism in Visegrad Countries. International Institute of Political Science of Masaryk University, Brno, 2011.

11. A good example can be the case of Latvian Citizenship Law (22 July 1994), which excluded all persons from Latvian citizenship who came into the country following 1940 (Art 2 (1)), and this provision mostly effected the former Russian USSR inhabitants having a permanent residence in Latvia. In theory they could apply for naturalization, however, it was *de facto* impossible because of the very demanding linguistic requirements (Art 12 (1) spec. 2, 3, 4). At the end, the status of these Russian persons was settled by the Law on the Status of Former USSR Citizens who do not have the Citizenship of Latvia or any Other State (1995). For the assessment of these problems see the report of Klaus Berchtold on the draft prepared for the Venice Commission: *Berchtold K.* Report on the draft Law on Citizenship in Latvia, 1993, CDL (1993) 005.

12. For more see: *I. Halász–B. Majtényi–B. Vizi.* A New Regime of Minority Protection? Preferential Treatment of Kin-Minorities under National and International Law // *Kántor Z.* et al. (ed.). The Hungarian Status Law: Nation Building and/or Minority Protection. Slavic Research Center, Hokkaido University, Sapporo, 2004. P. 328–349.

13. Cf. Article 7a of the Constitution of the Slovak Republic: „The Slovak Republic promotes national awareness and cultural identity of Slovaks living

abroad, supports their institutions intended to achieve this aim and their relations with the mother country".

14. Cf. Article 5 of the Constitution of the Republic of Slovenia: „Slovenians not holding Slovenian citizenship shall enjoy special rights and privileges in Slovenia. The nature and extent of those rights and privileges shall be determined by statute".

15. Article D of the Hungarian Fundamental Law: „Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, shall facilitate the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, the application of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary".

16. *Sajó A.* Op. cit. 1999.

17. Cf. Id. P. 49–68.

18. Cf. I. *Bibó A.* Eltorzult magyar alkat, zsákutcás történelem (Deformend Hungarian Mentality, Defeated Hungarian History / I. Bibó A. Válogatott tanulmányok (Selected Studies). Magvető, Budapest, 1986. P. 571–619.

19. See for example: Excerpts from the Preamble of the Constitution of the Republic of Poland: «Having regard for the existence and future of our Homeland, Which recovered, in 1989, (...) Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice (...)». Some parts of the National Avowal of the new Hungarian Fundamental Law are also very telling in this respect: «We do not recognise the communist constitution of 1949, since it was the basis of a tyrannical rule; (...) We date the restoration of the self-determination of our State, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected popular representation was formed».

20. A Hungarian scholar in the field of aesthetics and philosophy, Ferenc Horkay Hörcher, argues that the Hungarian preamble is strongly linked to 19th century nationalist poetry playing a crucial role in the creation of these peoples' national spirit and identity. See: *Ferenc Horkay Hörcher.* The National Avowal / L. Csink — B. Schanda — A. Zs. Varga (eds.). The Basic Law of Hungary. A First Commentary. Clarus Press, Dublin, 2012. P. 25–45.

21. These are the so-called «Europe-clauses» or «Europe articles». For a detailed analysis see: *Albi A.* 'Europe Articles' in the Constitutions of the Central and Eastern European Countries // Common Market Law Review. 2005/2. № 42. P. 399–423.

22. Article E (2) of the Hungarian Fundamental Law: „In order to participate in the European Union as a Member State, and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations set out in the founding treaties, exercise some of its competences deriving from the Fundamental Law jointly with other Member States, through the institutions of the European Union".

23. Just compare the Hungarian «Europe-clause» to the Austrian one: Article 9 (2) of the Austrian Federal Constitutional Law: «By Law or state treaty having been approved according to Art. 50 para 1 may transferred specific Federal competences to other states or intergovernmental organizations». (The reference means that it requires the approval of the National Council.) The differences are apparent and they cannot simply be explained in legal terms.

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## К вопросу о роли компаративистского подхода в деятельности органов конституционной юстиции

Современный уровень конституционного судопроизводства позволяет выделить в качестве одной из особенностей конституционного судопроизводства возможность обращения к опыту зарубежных стран при вынесении решений. Указанное направление не является приоритетным в деятельности конституционных судов, однако изучение подобного явления представляется интересным и актуальным. В качестве примера можно привести ряд решений различных конституционных судов, которые анализируют